In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner, Lou V. Brewer, Warden of the Iowa State Penitentiary at Fort Madison, Iowa, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 31, 1974.

OPINION BELOW

The opinion of the Court of Appeals has not as yet been published, and it appears at Appendix A. Appendix B cites the opinion of the District Court.

JURISDICTION

On the 31st day of December, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment (see Appendix A). On the 30th day of January, 1975, the Court of Appeals for the Eighth Circuit filed its Order on Petition for Rehearing En Banc (see Appendix C). Upon a motion by petitioner, a Stay of issuance of the mandate was granted on February 6, 1975, provided that an application by the State of Iowa is made to the United States Supreme Court for a Writ of Certiorari (see Appendix D). The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Federal District Court exceed its authority by disregarding the presumption of correctness given state court written findings of fact pursuant to 28 U.S.C. §2554(d) and by resolving disputed facts without conducting an evidentiary hearing as required by *Townsend* v. *Sain*, 372 U.S. 293 (1963)?

2. Can the retention of counsel preclude an accused from waiving his personal constitutional right absent the presence of that counsel?

3. Did the District Court err in disregarding relevant record facts showing a waiver of constitutional rights thereby inappropriately holding that the state failed to meet its burden of proof?

4. Should a more flexible standard be adopted to replace the too restrictive requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)?

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendments V, VI and XIV of the Constitution of the United States and Title 28 U.S.C. §2254(d) are set forth in Appendix E.

STATEMENT OF THE CASE

Robert Anthony Williams, a/k/a Anthony Erthel Williams, herein referred to as "Williams" was convicted upon jury trial in Polk County District Court of the crime of first degree murder and sentenced to life imprisonment in the Iowa State Penitentiary. The Iowa Supreme Court affirmed the conviction and denied rehearing. *State* v. *Williams*, 182 N.W.2d 396 (1971).

After exhaustion of his state remedies, Williams filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. The petition was sustained. *Williams* v. *Brewer*, 375 F. Supp. 170 (S.D. Ia. 1974).

The judgment of said United States District Court was affirmed by the United States Court of Appeals for the Eighth Circuit on December 31, 1974, on the opinion of a panel of that Court with one Judge dissenting. A Petition for Rehearing En Banc was denied by Order of the Court entered January 30, 1975, Chief Judge Gibson with Judges Stevenson and Webster voting to grant the Petition. A Stay of issuance of the mandate was granted for sixty (60) days on February 6, 1975, provided that the State of Iowa made application to the United States Supreme Court for a Writ of Certiorari.

The Facts

It was about noon of the day before Christmas 1968, and 14-year-old Mark Powers was competing in a wrestling match at the Des Moines YMCA. His proud mother and sister, 10-year-old Pamela, came to watch and cheer him on. As they were going in Pamela, a bright, slightly built little blue-eyed blonde girl, asked her mother if she could have some candy. The child's mother at that time refused but, as parents will, later relented and gave her a quarter to buy a candy bar. Pamela scurried off and returned with her purchase only to remember that just before leaving home she had been cuddling her puppy. Because of this Pamela asked her mother if she could go wash her hands before eating the candy. Her mother said yes and Pamela left, never to be seen alive again by those who loved her.

Sometime after Pamela left, her father, Merlin Powers, and 16-year-old sister Vickie came to join the audience. Pamela's mother asked her husband if he had seen Pamela in the lobby as he came in. The father said no and with growing alarm the anxious parents began to look for their little girl enlisting the aid of YMCA personnel in their frantic search, but to no avail.

Pamela's small body, clad only in a shirt, was found two days later frozen to a culvert on a lonely rural road where Williams had thrown her. Part of her nose had been eaten off by rodents or other small animals. A medical examination showed that little Pamela was dead before being tossed into the culvert.

The examining physician who performed the autopsy testified that 10-year-old Pamela's young body had been sexually ravaged. Seminal fluid was present in her vagina and rectum. The physician stated that there were no

signs of pressure having been applied to the external area of Pamela's neck and throat, but that the interior of the young child's mouth was torn and bruised, with seminal fluid throughout. Death was due to strangulation, "like a baby holding its breath till it gets blue."

Shortly after Pamela disappeared, Williams, a YMCA resident, was seen hurriedly carrying a large bundle from the elevator through the lobby. The bundle was wrapped in an old blanket, and Williams told a bystander that it was a mannequin. Outside, Williams asked a 14-year-old boy to open the door of his car. YMCA personnel assisting Pamela's parents in the search noticed Williams and the "mannequin" and followed him to his car. When approached by these individuals, Williams shoved one of them back, jumped into his car, locked the doors, and sped away. At trial, the boy who opened the car door testified that when Williams put the bundle into the back seat, he "saw two white legs in it and they were skinny and white."

On Christmas Day Pamela's father identified his young daughter's slacks and socks discarded along the interstate east of Des Moines; further along the interstate Williams' car was found in Davenport, Iowa. Early the next day, Williams telephoned his attorney in Des Moines for advice. He was counseled to turn himself in to the authorities and shortly thereafter presented himself to Davenport Police, who arrested him, booked him, and read him *Miranda* warnings. Williams again telephoned his attorney in Des Moines. In the presence of police officers, Attorney McKnight told Williams not to make any statements until he returned to Des Moines. The police officers immediately departed under an alleged agreement not to question Williams until they met with counsel on their return to Des Moines. Williams was again advised of his *Miranda* rights by a state court judge. After arriving in Davenport and before de-

parting for Des Moines, Williams was again informed of his *Miranda* rights. While in Davenport, Williams conferred with an Attorney Kelly on three occasions. There is disputed testimony to the effect that Kelly advised the police that Williams would make no statements until he reached Attorney McKnight and that Attorney Kelly asked Detective Leaming that he be permitted to ride with Williams to Des Moines.

Upon leaving Davenport, Williams initiated conversations with Leaming concerning the police investigation; if the police had checked for fingerprints in his room, and other general conversation. Sometime during the trip, Williams made statements, interpreted by the federal court in contravention of the state court finding of fact, that Williams invoked his constitutional rights.

While en route to Des Moines one of the officers commented that the weather was beginning to turn bad and that discovery of the body and a decent burial for the child might be delayed by snow covering the body. After traveling some distance further, Williams suddenly asked the escorting officers whether the police had found Pamela's shoes and the blanket in which he had wrapped her, and directed them first to a gas station and then to an interstate rest-stop in order to check garbage barrels. As the automobile in which they were riding neared Des Moines, Williams told the officers, "I'm going to show you where the body is." He then guided the officers to a lonely rural road where the young girl's body was found.

REASONS FOR GRANTING THE WRIT

"I. THIS CASE PRESENTS SERIOUS QUESTIONS CONCERNING FEDERAL HABEAS CORPUS REVIEW OF A STATE COURT CONVICTION IN THAT THE

DECISION CONFLICTS WITH *TOWNSEND* v. *SAIN*, 372 U.S. 293 (1963) AND DID NOT COMPLY WITH THE PROVISIONS OF 28 U.S.C. §2254(d).

II. THE DECISION OF THE CIRCUIT COURT CONSTITUTES AN UNWARRANTED EXTENSION OF WAIVER OF THE RIGHT TO COUNSEL AND CONFLICTS IN PRINCIPLE WITH A PRIOR DECISION OF THE EIGHTH CIRCUIT AND DECISIONS OF OTHER CIRCUITS.

III. THIS DECISION IS IN CONFLICT WITH OTHER CIRCUITS IN THAT IT DISREGARDED SIGNIFICANT FACTS RELEVANT TO THE DETERMINATION OF THE ISSUE OF WAIVER.

IV. THE HARSH APPLICATION OF *MIRANDA* v. *ARIZONA*, 384 U.S. 436 TO THIS CASE DEMONSTRATES A SIGNIFICANT NEED TO ADOPT A MORE FLEXIBLE STANDARD TO PROTECT THE RIGHTS OF BOTH THE INDIVIDUAL AND SOCIETY AS A WHOLE.

The state trial court, in determining the issue of waiver, found, on the undisputed state's evidence, that Williams did *not* request assistance of counsel during the trip from Davenport to Des Monies. An opposite finding of fact was made by the Federal District Court after examination of the state court record. Pursuant to 28 U.S.C. §2254(d), a state court's written determination of a factual issue following a hearing is presumed correct in a federal habeas court absent enumerated state proceeding defects. As noted by Judge Webster in dissent, "to the extent that findings of fact were indisputably made by the state trial judge, those facts are to be taken as true unless they fall within the stated exceptions of 28 U.S.C. §2254(d)." None of the enumerated exceptions apply to this written finding of fact.

The language in the bare record interpreted by the federal court as an invocation by Williams of his right to counsel is, as noted by Judge Webster, ambiguous on its face. It is significant that the statement in question was the product of a state's witness, Detective Leaming. A proper interpretation of the testimony rests entirely upon the credibility and demeanor of the witness. While the state trial judge questioned Detective Leaming's candor, he did not find in Leaming's testimony that Williams invoked his right to counsel. Moreover, although Williams testified at the suppression hearing, not an inkling of his testimony indicates he invoked his rights. The findings of the state court must be given great deference for he had the witnesses before him and was in a far superior position to comprehend the true meaning of the testimony.

The Court of Appeals found that the issue of waiver is a federal question. As such, the federal courts are obligated to make their own independent determination. Petitioner suggests that the resolution of the issue of waiver necessarily turns upon the facts. Thus, Petitioner submits the presumption contained in 28 U.S.C. §2254(d) applies to the underlying facts in determining the federal question of waiver. As stated in this Court's decision of *Townsend* v. *Sain*, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the precursor of §2254(d): "It is the district judge's duty to apply the applicable federal law to the state court fact findings independently." [See *United States ex rel. Falconer* v. *Pate*, 319 F. Supp. 206 (N.D. Ill. E.D.) for application of 28 U.S.C. §2254(d) to facts of waiver of *Miranda* rights, affirmed, 478 F.2d 1405 (1973)].

The District Court adopted Williams' version of the facts entirely. The court below concedes the discrepancies between the testimony of Mr. Kelly and Detective Leaming exist in the state record. These critical disputed facts

were not, as the Court of Appeals concedes, resolved by the state court. This Court has held that where the merits of a factual dispute were not resolved in a state court, the federal habeas court is obligated to conduct an evidentiary hearing. *Townsend* v. *Sain*, supra. The state, as well as the habeas applicant, is entitled to this hearing. *United States ex rel. McNair* v. *New Jersey*, 492 F.2d 1307 (3rd Cir. 1974). Moreover, as the Court of Appeals points out, other ambiguities exist in the record which were relied upon by the District Court to make its findings. It was incumbent upon the District Court to conduct an evidentiary hearing before resolving critical facts which turn upon the credibility and demeanor of the narrators.

> "Considerations of comity and proper respect for the state courts counsel against precipitous action to invalidate their judgement. If, when viewed against the backdrop of all the facts, the state court decision may be found to be correct, it should not be overturned because it is based on less than all the information which can be made available to the district court." *McNair*, supra.

The lower court's treatment of the facts raises serious problems concerning the role of a federal court on review of a state conviction. If federal courts are hereafter allowed to resolve facts in similar fashion, there would be little purpose in having an original adjudication of federal rights in the state courts. J. Skelly Wright and Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L. J. 895, 920-922 (May 1966).

Disregard of the presumption of correctness of 28 U.S.C. §2254(d) and a failure to conduct an evidentiary hearing in violation of this Court's decision of *Townsend* v. *Sain* constitutes error.

The decision below, in effect, places control of the constitutional right to counsel in the hands of counsel rather than the accused.

The Circuit Court enumerated certain facts in determining Williams did not effectively waive his right to counsel. The court found the police made and broke an agreement with defense attorney McKnight: Williams would not be questioned before consultation with McKnight in Des Moines. As pointed out by Judge Webster in dissent, the alleged "broken promise" of Captain Leaming was at the root of the result in this case.

While the breaking of an agreement between police and defense counsel is viewed as questionable police conduct, it cannot preclude Williams from effectively waiving his rights. The Sixth Amendment right to counsel is inherently a personal right, a right only Williams could waive. Counsel cannot make a contractual agreement to limit his client's prerogative to assert or waive a known constitutional right. See *Brookhart* v. *Janis*, 381 U.S. 1 (1966). The situation is analogous to a prosecutor and defense counsel entering a plea of guilty agreement; certainly the defendant is not bound to it. To hold otherwise would contravene the time-tested definition of waiver: "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The making and breaking of an agreement between counsel and police is completely irrelevant to whether Williams voluntarily waived his right to counsel.

The decision in this case has, in principle, established a rule that an accused cannot effectively waive his right to counsel for purposes of interrogation, absent presence of counsel. The circuits which have dealt with this question conflict in their result. Some in accord with the decision in this case concluded logical extensions of *Massiah*

v. *United States*, 377 U.S. 201 (1964) prohibited interrogation absent counsel's presence. Accord *United States* v. *Durham*, 475 F.2d 208 (7th Cir. 1973). Others in accord with this decision interpreted *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) to prohibit interrogation unless counsel was present. Accord *Mathias* v. *United States*, 374 F.2d 312 (D.C. Cir. 1967) and *United States* v. *Wedra*, 343 F. Supp. 1183 (S.D.N.Y. 1972). A different panel of the Eighth Circuit in *Moore* v. *Wolff*, 495 F.2d 35 (8th Cir. 1974) rejected this theory. Following the reasoning of *United States* v. *Cobbs*, 481 F.2d 196 (3rd Cir. 1973) and *Coughlan* v. *United States*, 391 F.2d 371 (9th Cir. 1968), that panel resisted any rigid criteria and instead found the test to be whether the accused knowingly, intelligently, and voluntarily waived his rights in the absence of counsel. While the lower court acknowledged *Moore* v. *Wolff*, supra, this decision reflects a contrary result.

Petitioner suggests that the extension of the test of waiver represented by the decision in this case erodes the personal nature of liberties guaranteed in the Constitution by placing the choice of invoking or waiving a constitutional right in the hands of counsel.

In finding that *no* facts existed to support a valid waiver, the Circuit Court ignored clear record facts which other courts have deemed material in a determination of waiver. Curiously, in finding no waiver, the court lists facts which are indicative of an effective waiver. The facts that Williams asked for and obtained attorneys in both Davenport and Des Moines and that the attorneys advised him to make no statements show Williams had knowledge of his rights.

The evidence is undisputed that Williams was given three separate *Miranda* warnings and expressly stated he

understood their meaning. There is no suggestion the warnings did not comport with Constitutional standards. He sought the advice of counsel and was instructed to remain silent. Absent coercion, such evidence reveals any waiver thereafter was intelligently and knowingly made. *Hughes* v. *Swenson,* 452 F.2d 866 (8th Cir. 1971).

Williams, himself, initiated conversations with Detective Leaming. He probed Leaming concerning the police investigations, asking Leaming if the police had checked for fingerprints in his room and if they questioned any of his friends. He asked questions about police procedure and a multitude of other subjects. When an accused, after being advised of his rights, actively seeks to speak with officials about matters under criminal investigation, such action is a strong indication of waiver. *Holloway* v. *United States,* 495 F.2d 835 (10th Cir. 1974); *United States* v. *Cobbs,* supra.

The record clearly shows that the incriminating statements made by Williams were spontaneous, and not the result of police questions. Leaming's statement about the weather and locating the body occurred approximately two hours before Williams made any incriminating statements. There is no evidence to suggest, that within that time interim, Williams was subjected to any interrogation, subtle or otherwise. As they neared the locations where Williams disposed of the incriminating evidence, he suddenly inquired if they had found the shoes, and moments later, the blanket. After leading the officers in a fruitless search for these items, they continued toward Des Moines. As they approached the Mitchellville exit, Williams stated, "I'm going to show you where the body is." He then directed the officers to the body. Volunteered statements are clearly admissible. *Miranda,* supra.

These relevant facts ignored by the lower court, establish that the state met its heavy burden in showing a knowing, intelligent, and voluntary waiver.

Failure to comply with the requirements of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), should no longer be grounds for the exclusion of oral admissions or other evidence which are the results of conversations with a suspect in custody. The holding of the Eighth Circuit in this case substantially formalizes *Miranda* requirements and is a major step in the elevation of form over substance. The decision of *Miranda* v. *Arizona,* supra, must not be allowed to foster the development of legal rituals, comparable to common law forms of action pleading, but demands re-evaluation of rights protection in the light of the changed circumstances of the past nine years.

The requirements of *Miranda* v. *Arizona,* supra, fulfilled a possible need to reform criminal justice procedures and re-orient thinking about the Fifth and Sixth Amendments. Most importantly, it called to the attention of those who enforce the law the Fifth and Sixth Amendments rights. However, the necessity for drastic measures can never be more than temporary and harsh rules must give way to re-evaluation. Today's better trained criminal justice personnel are demonstrating maturity and responsibility and the system as a whole can be trusted not to abuse a more flexible standard which has greater potential for achieving the ends of criminal justice while continuing to protect individual liberties, by applying the Fifth and Sixth Amendments rights with a view to the totality of the circumstances.

Petitioner urges this Court to withdraw the technical requirements of *Miranda* v. *Arizona,* supra, in favor of the more flexible procedures adopted by Congress in the

Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §3501 (1968).

CONCLUSION

For these reasons, a Writ of Certiorari shoud issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

RICHARD N. WINDERS
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on this 4th day of April, 1975, three (3) copies of the Petition for a Writ of Certiorari were mailed, correct postage prepaid, to:

Mr. Robert Bartels
College of Law
University of Iowa
Iowa City, Iowa 52242
Counsel for Respondent

I further certify that all parties required to be served have been served.

RICHARD N. WINDERS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

Robert Anthony Williams, a/k/a Anthony Erthel Williams,
Appellee,

v.

Lou V. Brewer, Warden,
Appellant.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: September 12, 1974.
Filed: December 31, 1974.

Before VOGEL, Senior Circuit Judge, ROSS and WEBSTER, Circuit Judges.

VOGEL, Circuit Judge.

Appellee, Robert Anthony Williams, was found guilty by jury verdict of murder and sentenced to life imprisonment in the Iowa State Penitentiary. In a five to four decision, the Supreme Court of Iowa affirmed the conviction and denied rehearing. See *State* v. *Williams*, 182 N.W.2d 396 (1971).

After exhaustion of his state remedies, appellee filed a petition for a writ of habeas corpus in the United States District Court[1] on the ground that certain statements made by appellee, and other evidence and testimony obtained as the result of those statements, were improperly admitted into evidence in contravention of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

In a carefully detailed and well supported opinion published as *Williams* v. *Brewer*, 375 F. Supp. 170 (1974), the District Court sustained the petition for a writ of habeas corpus. Timely appeal was made to this court.

We affirm.

Evidentiary Facts.

The attorneys for the parties agreed to submit the case to the District Court on the record of facts and proceedings in the state trial court.

The District Court, in an exercise of its discretion, agreed to review appellee's petition based upon the state court records. *Dempsey* v. *Wainwright*, 471 F.2d 604, 606 (5th Cir. 1973), *cert. denied*, 411 U.S. 968, 93 S.Ct. 2158, 36 L.Ed.2d 690 (1973). The District Court accordingly made its findings of fact, upon which it based its order, without conducting further evidentiary hearings.

The following facts are unchallenged by either party:

On December 24, 1968, the Powers family attended a wrestling tournament in the YMCA building in Des Moines, Iowa. When Pamela Powers, aged 10, failed to return from a trip to the restroom, a search was started.

1. The Honorable William C. Hanson, Chief Judge, United States District Court for the Southern District of Iowa.

The police were called after she could not be located in the building.

Appellee Williams, who had a room on the seventh floor of the YMCA building, was seen in the lobby coming from the elevator carrying some clothing and a large bundle wrapped in a blanket. He spoke to several persons on the way out, explaining to one that he was carrying a mannequin. He requested the aid of a 14-year-old boy to open first the street door and then the door of his Buick automobile parked at the curb. This boy testified that when the appellee placed the bundle in the passenger's seat he "saw two legs in it and they were skinny and white." Efforts by YMCA personnel to view the object were thwarted by the appellee as he closed and locked the car doors and drove away.

On the following day appellee's car was found by police in Davenport, Iowa, approximately 160 miles east of Des Moines. At that time a warrant on a charge of child stealing was issued for appellee's arrest.

Sometime in the morning of December 26, 1968, appellee called from Rock Island, Illinois, to Attorney Henry T. McKnight of Des Moines, Iowa. Mr. McKnight advised the appellee to surrender himself to the Davenport, Iowa, police. Appellee did so.

After the first long distance telephone call from appellee, Mr. McKnight proceeded to the Des Moines police station where he received another long distance telephone call from the appellee, this time from Davenport where he was in police custody. Mr. McKnight, in the presence and hearing of Chief of Police Wendell Nichols and Detective Cleatus M. Leaming, told the appellee that he would be transported from Davenport to Des Moines by Des Moines

policemen, that he would not be mistreated or grilled, that they would talk the matter over in Des Moines, and that appellee should make no statement until he reached Des Moines.

Thereafter, it was agreed that Detective Leaming and Detective Nelson would go to Davenport to pick up the appellee without Mr. McKnight accompanying them, and that the appellee would be brought directly back to Des Moines. Mr. McKnight and the police also agreed that appellee would not be questioned until after he had been returned to Des Moines and consulted with Mr. McKnight.

While the appellee was in Davenport in police custody, and at his request, he consulted with a local attorney, Mr. Thomas Kelly, who thereafter acted in his behalf while the appellee was in Davenport. Mr. Kelly advised the appellee to remain silent until he had arrived in Des Moines and consulted with Mr. McKnight.

After arriving in Davenport and before departing for Des Moines, Detective Leaming advised the appellee of his *Miranda* rights. These rights were not repeated during the trip to Des Moines.

On the trip from Davenport to Des Moines, Detective Leaming and the appellee sat in the rear seat of the car with Detective Nelson driving. Leaming and the appellee engaged in conversation. They discussed religion, appellee's reputation, appellee's friends, police procedures, aspects of the police investigation into this matter, and various other topics.

At this time Detective Leaming knew that the appellee had been a patient in the state mental hospital at Fulton, Missouri, for a period of about three years and that he was an escapee therefrom.

On several occasions during the return trip to Des Moines appellee told Detective Leaming that he would tell him the whole story after he returned to Des Moines and consulted with his attorney, Mr. McKnight.

According to Detective Leaming's own testimony, the specific purpose of his conversation with appellee was to obtain statements and information from appellee concerning the missing girl before the appellee could consult with Mr. McKnight.

The following testimony by Detective Leaming during the hearing on the motion to suppress describes a portion of his conversation with the appellee:

> Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

In response to an inquiry by appellee, Leaming told the appellee that he knew the body was somewhere in the area of Mitchellville, a town 15 miles from Des Moines and along the freeway between Davenport and Des Moines. Leaming later testified that he did not, in fact, know that the body was near Mitchellville.

Shortly before reaching the Mitchellville turnoff, the appellee told Leaming that he would show him where the body was located. Accompanied by other police officers who were following them, they drove to a location designated by the appellee; the body of Pamela Powers was found in a ditch alongside the highway.

Appellee's statements and other evidence obtained pursuant to such statements were admitted into evidence at trial, all over the objections of appellee's attorney.

Challenged Evidentiary Facts.

As noted heretofore, this case was submitted to the United States District Court on the record of the facts and proceedings in the state court. Under such circumstances, a federal court in reviewing an application for writ of habeas corpus is to presume as correct the facts as determined by the state court (subject to various exceptions). 28 U.S.C. § 2254(d).[2]

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2. Section 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(Continued on following page)

The appellant contends here that the United States District Court made certain findings of fact contrary to the findings in the state court and therefore violated the provisions of 28 U.S.C. § 2254(d).

The District Court specifically found that Mr. Kelly, appellee's Davenport attorney, had advised Detective Leam-

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Footnote Continued—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

ing prior to his departure from Davenport with the appellee that the appellee was not to be questioned until he got to Des Moines and that Mr. Kelly had asked Leaming that he be permitted to accompany the appellee to Des Moines and that Leaming denied the request.

The District Court also found that Leaming knew that the appellee was a deeply religious person and that he used that knowledge to elicit incriminating statements from the appellee.

The District Court also found that the misstatement by Leaming that he knew the whereabouts of the body of Pamela Powers had a compelling influence on the appellee to make incriminating statements.

A review by this court of the record of the state proceedings reveals certain discrepancies between the testimony of Mr. Kelly and Detective Leaming and certain ambiguities in some of the testimony upon which the District Court relied in making its findings. The record also indicates with regard to the facts challenged here that the state court did not resolve "the merits of the factual disputes." Accordingly, where neither party has requested an evidentiary hearing, the federal court is not constrained in its fact findings by the presumption of correctness to be given findings of the state court. 28 U.S.C. § 2254(d)(1).

This court therefore finds that the District Court correctly applied 28 U.S.C. § 2254 in its resolution of the disputed evidentiary facts, and that the facts as found by the District Court had substantial basis in the record.

Waiver of Constitutional Rights.

Contrary to the findings of the state courts, the United States District Court found that waiver is a question of

law. Appellant suggests that the District Court has mischaracterized the issue of waiver as one of law rather than fact and, in so doing, has erroneously avoided the presumption of correctness to be given to the state courts' factual resolutions.

In this case, the issue of whether appellee waived his right to counsel can best be characterized as an "ultimate fact" or as a "conclusion of fact." The appellation of "fact" or "law" is nevertheless not determinative here. The significant element in deciding the scope of the federal review is that waiver involves the question of whether appellee has exercised or relinquished a *constitutional* right. As such, waiver becomes a federal question about which the federal courts are obligated to make their own independent determination. As said by Mr. Justice Black in *Brookhart* v. *Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314, 317 (1966):

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

See also *Hamilton* v. *Watkins*, 436 F.2d 1323, 1326 (5th Cir. 1970); *Doerflein* v. *Bennett*, 405 F.2d 171 (8th Cir. 1969); *Fugate* v. *Gaffney*, 313 F.Supp. 128, 132 (D. Neb. 1970), *aff'd*, 453 F.2d 362 (8th Cir. 1971), *cert. denied*, 409 U.S. 888, 93 S.Ct. 142, 34 L.Ed.2d 145 (1972).

28 U.S.C. § 2254(d) was not intended to replace this constitutional obligation of the federal court. In *In re*

Parker, 423 F.2d 1021, 1024 (8th Cir. 1970), *cert. denied*, *Parker* v. *South Dakota*, 398 U.S. 966, Judge Lay stated it this way:

> To avoid misunderstanding, the statute does not replace the federal court's constitutional obligation to make its own independent determination on federal questions. The Supreme Court has made clear that a federal court's consideration of the constitutional question shall be plenary. Townsend v. Sain, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). As Mr. Justice Frankfurter said in Brown v. Allen, 344 U.S. 443, 506, 508, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1952):
>
> "On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide."
>
> * * *
>
> "Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."

The federal court is obligated to make a full and complete review of the records of the state courts in order to comprehend the totality of the circumstances upon which the ultimate question of waiver must be determined. In *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the United States Supreme Court stated:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.* (Emphasis supplied.)

See also *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Stidham* v. *Swenson*, 15 Crim. Law Rep. 2072 (8th Cir., March 28, 1974).

The District Court found that the state court had applied the wrong constitutional standard in its determination of the issue of waiver by failing to place the burden on the prosecution to show that appellee had waived his constitutional rights. Appellant contests this finding of the District Court.

Miranda v. *Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), places upon the prosecution the heavy burden of demonstrating that the accused knowingly and intentionally waived his privilege against self-incrimination and his right to have counsel present. The The District Court here found that the state trial court failed to place such burden upon the state prosecutor before it allowed into evidence incriminating statements made by appellee to Detective Leaming and that therefore the state court had applied the wrong constitutional standard. Appellant points out that the District Court may properly assume, in the absence of evidence to the contrary, that the state court applied correct standards of federal law to the facts when the state court does not

articulate the constitutional standards applied. *Townsend* v. *Sain*, 372 U.S. 293, 314-315, 83 S.Ct. 747, 9 L.Ed.2d 770 (1963).

A review of the record here, however, discloses no facts to support the conclusion of the state court that appellee had waived his constitutional rights other than that appellee had made incriminating statements. Although oral or written expression of waiver is not required, waiver of one's rights may not be presumed from a silent record. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 475; *Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70, 77 (1962). The District Court here properly concluded that an incorrect constitutional standard had been applied by the state court in determining the issue of waiver.

Further, the resolution of the waiver issue by the state court, although after fair consideration and following procedural due process, cannot be accepted as binding when it has misconceived a federal constitutional right. *Brown* v. *Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 437, 97 L.Ed. 469 (1953); *Townsend* v. *Sain*, *supra*, 372 U.S. at 318; *Doerflein* v. *Bennett*, *supra*.

Appellant points out that this court recently held that an accused can voluntarily, knowingly and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. See *Moore* v. *Wolff*, 495 F.2d 35 (8th Cir. 1973). The prosecution, however, has the weighty obligation to show that the waiver was knowingly and intelligently made. We quite agree with Judge Hanson that the state here failed to so show.

In this case, appellee had obtained counsel in both Des Moines and Davenport and had been advised of his *Miranda* rights prior to departure from Davenport. Once the *Miranda* warnings have been given, the subsequent

procedure to be followed by the police is well set forth by the Supreme Court as follows:

> Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 473, 474. (Emphasis supplied.)

The facts in this case clearly indicate that the appellee told Detective Leaming several times during the automobile trip to Des Moines that he would tell the whole story *after* consulting with Mr. McKnight. Despite this indication by appellee that he wished to delay his statement until he had consulted with his attorney in Des Moines, Detective Leaming persisted in his "conversation" with appellee with the admitted intent of obtaining information before their arrival in Des Moines and appellee's consultation with his attorney there. By means of a subtle form of interrogation, Leaming did obtain the incriminating statements from appellee.

It is pointed out by Judge Hanson, and also noted by the state courts, that there was an agreement between the Des Moines police and appellee's Des Moines attorney that appellee was not to be questioned before he reached Des Moines. Although we deem it immaterial, there is substantial justification for the conclusion that Detective Leaming was aware of such agreement. In any event, Leaming violated the terms of the agreement when he engaged in his subtle conversation with the appellee with the specific and admitted intent of soliciting incriminat-

ing statements before their arrival in Des Moines and appellee's consultation with Attorney McKnight.

The "particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused" referred to by the Supreme Court in *Johnson* v. *Zerbst*, *supra*, might be partially enumerated as follows: (1) The appellee was an escapee from a mental institution wherein he had been confined for approximately three years; (2) appellee asked for and obtained an attorney to represent him at each end of the trip between Davenport and Des Moines; (3) Mr. Kelly, appellee's Davenport attorney, had asked permission to accompany the appellee on the trip from Davenport to Des Moines, which permission was denied by the police; (4) both attorneys had advised appellee not to make any statements until after arriving in Des Moines and consulting with Attorney McKnight; (5) appellee gave several indications that he did not want to talk about the case until *after* he arrived in Des Moines; (6) appellee stated a number of times that he would talk about the case *after* he had seen Attorney McKnight in Des Moines; (7) by suble interrogation Detective Leaming got the appellee to make incriminating statements used to convict him; (8) the police violated an agreement they had with Attorney McKnight that the appellee was not to be questioned before consultation with Mr. McKnight in Des Moines. Cf. *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *United States ex rel Magoon* v. *Reincke*, 304 F.Supp. 1014, *aff'd* 416 F.2d 69 (2d Cir. 1969); *Taylor* v. *Elliott*, 458 F.2d 979 (5th Cir. 1972), *cert. denied*, 409 U.S. 885, 93 S.Ct. 117, 34 L.Ed.2d 142 (1972).

Under all of these circumstances, we find that Judge Hanson was eminently correct in holding that the appellee's constitutional rights had been violated in that he was

denied the right to counsel and that he had not voluntarily, intelligently and effectively waived his rights.

The decision and order of the District Court are affirmed. WEBSTER, Circuit Judge, dissenting.

I must respectfully dissent.

This habeas corpus case was tried to the District Court by stipulation on the record of the state court proceedings. To the extent that findings of fact were indisputably made by the state trial judge, those facts are to be taken as true unless they fall within the stated exceptions of 28 U.S.C. §2254. See note 2 of the majority opinion, *supra*. To the extent that additional facts were found by the District Judge upon his review of the bare record, without having heard any of the witnesses, we need give such findings no special deference since the District Judge was in no better position to make credibility judgments than we find ourselves today. But conceding for purposes of this opinion each of the so-called disputed facts as found by the District Judge, I find myself in disagreement with the ultimate conclusions reached in the majority opinion that Williams "was denied his right to counsel and that he had not voluntarily, intelligently and effectively waived his rights."

I.

It is not disputed that Williams was advised of his full *Miranda* rights on three occasions: by Lieutenant Ackerman of the Davenport Police Department, by the state judge before whom he was brought upon his arrest and by Captain Leaming upon his arrival in Davenport. There is no suggestion that the advices given did not comport with Constitutional standards or that Williams did not understand their meaning. He expressly stated that he did, and therefore understood, as he was told, that he had

the right to remain silent and to be represented by an attorney during questioning. That Williams had thus received effective advice appears to be conceded by the majority. We must next proceed to a consideration of whether Williams thereafter intelligently and knowingly declined to exercise his rights. *Hughes* v. *Swenson,* 452 F.2d 866 (8th Cir. 1971).

At the time of his arrest, Williams had already retained Henry McKnight, a Des Moines attorney. McKnight advised him by telephone not to talk with the police until he returned to Des Moines. While in court at Davenport, Williams observed and asked to speak with a local attorney, Thomas Kelly. Kelly conferred with Williams two times in private. According to Williams, Kelly then advised the police that Williams wouldn't be talking to them until his return to Des Moines. Thus it is clear to me that Williams was not only aware of his right to counsel, he sought and received the advice of two attorneys and knew that both of them thought he should remain silent. The inference is clear that—putting aside any question of coercion—any waiver thereafter was intelligently and knowingly made. *Hughes* v. *Swenson, supra.*

The District Judge held Williams could not effectively waive counsel for purposes of interrogation in the absence of counsel. This was error. While recognizing that the burden of showing a knowing and intelligent waiver is a heavy one, we have held that such waiver can occur notwithstanding that counsel has been appointed. *Moore* v. *Wolff,* 495 F.2d 35 (8th Cir. 1974). Waiver is to be judged from the whole record. *United States* v. *Harden,* 480 F.2d 649 (8th Cir. 1973). Express words of waiver are not required. *Hughes* v. *Swenson, supra; United States* v. *Montos,* 421 F.2d 215, 224 (5th Cir.), *cert. denied,* 397 U.S. 1022

(1970); *United States* v. *Ganter,* 436 F.2d 364, 369-370 (7th Cir. 1970); *United States* v. *Hilliker,* 436 F.2d 101, 102-03 (9th Cir. 1970), *cert. denied,* 401 U.S. 958 (1971); *Bond* v. *United States,* 397 F.2d 162, 165 (10th Cir.), *cert. denied,* 393 U.S. 1035 (1968).

The record reveals that as the police car began its return trip from Davenport to Des Moines, the car was driven by Detective Nelson, with Captain Leaming and Williams in the back seat. After a while Williams opened up a conversation, asking such questions as whom the police had talked to and whether there were any fingerprints. They also talked about police procedures, religion, youth groups and singing. Eventually Leaming made his observation about the weather and expressed the hope that Williams would agree to stop and locate the body. (Quoted in majority opinion at 5.) He prefaced his statement by saying this was something he wanted Williams to think about as they were travelling down the road. He concluded this statement with another statement, not quoted in the majority opinion:

> I do not want you to answer me. I don't want to discuss it any further.

The record reveals that sometime later, without any further reference to Leaming's suggestion, Williams suddenly asked, "Did you find her shoes?" He then directed them to a filling station, where they made a fruitless search for the child's shoes. They returned to the freeway, and as they passed a rest area on their left, Williams asked, "Did you find the blanket?" He then told them he had disposed of the blanket at the rest area. They turned around and returned to the rest area. They did not find the blanket because it had already been located. Again they returned to the freeway and resumed their journey toward Des Moines. Still some distance east of

Mitchellville, Williams suddenly said, "I'm going to show you where the body is." They exited from the freeway at the turn-off indicated by Williams, and after one or two false turns, finally came to a place in the road where the body was located in the snow.

Against this massive evidence of knowing and intelligent waiver of the right to silence and to counsel during interrogation, the only fact asserted to the contrary is the statement of Williams, made several times according to Leaming, that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." First, this statement is ambiguous on its face. I do not find in this assurance of cooperation an indication "in any manner" that Williams wished to refrain from giving information. *See Miranda* v. *Arizona*, 384 U.S. 436, 473-74 (1966). There is absolutely nothing in the record to suggest that these statements were made in response to questions by Leaming; rather, the evidence is that prior to Williams' statement that he was going to show them where the body was neither police officer was putting questions to Williams. Williams brought up the shoes, Williams brought up the blanket and Williams volunteered the statement that he was going to show them the location of the body.[1]

1. If, as the state judge found, an agreement not to question Williams in the car had been made with counsel, this agreement could hardly be said to preclude a waiver of counsel during a pretrial conversation, regardless of the serious reflection thereby cast upon the police procedures employed. It is the accused in custody who waives, not his counsel, and Williams was never at any time told in any way that he had lost either his right to remain silent or to have counsel present during an interrogation. Neither does the record warrant any inference of incapacity because Williams happened to be an escapee from a mental institution. The state district judge ruled against Williams on this point, permitting this fact in evidence only as bearing upon his criminal intent, and the point is not preserved on this appeal.

It has been suggested that Williams' admissions were obtained by ruse and that his Sixth Amendment rights were thus violated. The District Judge's reliance upon *Massiah* v. *United States*, 377 U.S. 201 (1964), is misplaced. There is no doubt that Williams was in custody and entitled to counsel unless waived. The difference between this case and *Massiah*, however, is that Williams *knew* his statements were being noted by police officers, and he had been expressly warned that such statements could be used against him.

I entertain grave doubts whether a federal judge should undertake to decide issues of credibility from a bare record without an independent evidentiary hearing. It was from such findings that the District Judge concluded that Leaming had contrived to thwart Williams' attorneys and thereby deprive him of assistance of counsel. The state trial judge who heard the evidence concluded otherwise; his assessment was sustained by the Supreme Court of Iowa, and I likewise believe the record supports the conclusions of waiver reached in the state proceedings.

II.

A distinct but factually related issue to be resolved is whether Williams' statements were involuntary and therefore produced in violation of his Fifth Amendment rights. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *see Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

No promises were made to Williams, and the record does not support any inference that the statements resulted from this sort of inducement. *See Hunter* v. *Swenson*, No. 74-1261 (8th Cir., October 24, 1974); *United States*

v. *Johnson*, 466 F.2d 1210 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

I am equally unpersuaded that the conversations in the police automobile, or, for that matter, the totality of the circumstances were so coercive that the statements of Williams must be considered the product of a will overborne. *See Townsend* v. *Sain*, 372 U.S. 293 (1963); *Iverson* v. *North Dakota*, 480 F.2d 414 (8th Cir.), *cert. denied*, 414 U.S. 1044 (1973). Williams himself initiated the discussions related to the crime. Williams himself asked questions about the investigation. He was not subjected to an intrusive examination. Each significant statement (the shoes, the blanket, the location of the body) was triggered, not by a police question, but by something Williams saw as they travelled along the freeway—a filling station, a rest area, an exit ramp.[2]

Certainly, Officer Leaming planted a thought that it would be useful and decent to locate the body as they passed through the area. But he also told Williams not to answer—just to think about it. If such conversations can be deemed coercive, we will have turned the criminal justice system upon its head. As Mr. Justice Cardozo once wrote:

> [J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.
>
> *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).

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2. Williams testified at the suppression hearing and once again during the trial, in chambers. He asserted nothing in such testimony from which the reviewing court could find additional evidence of mistake or coercion.

III.

I have carefully reviewed the record of the entire state proceedings. What transpired in the police automobile is clear. Williams understood his rights; he was promised nothing; he was not coerced. To say this much is not to approve of any techniques which involve misrepresentations to counsel, if in fact Leaming was guilty of such acts as the District Judge found. But addressing myself to the findings of the state district judge, I believe they are supported by the record. We should not advance the Constitutional protection of the Fifth and Sixth Amendments to strike down admissions knowingly and intelligently made after full *Miranda* warnings and advice of counsel on such unsupported factual inferences as that Williams "gave several indications that he did not want to talk about the case until *after* he arrived in Des Moines." (Majority opinion at 17.) A fair reading of the record is that each statement was not in response to a specific inquiry but was spontaneous. *See United States* v. *Stabler*, 490 F.2d 345, 350-51 (8th Cir. 1974).

This was a brutal crime.[3] The evidence of Williams' guilt was overwhelming. No challenge is made to the reliability of the fact-finding process; the statements dealt not with guilt but with the location of evidence, and were corroborated by other evidence. I cannot but assume that the alleged "broken promise" of Captain Leaming is at the root of the result reached in this case. If, as I believe, there was no violation of Williams' Fifth or Sixth Amendment rights, then the effect is to apply the federal exclusionary rule in a state case to improve future police

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3. The medical examiner testified that he found positive evidence of seminal fluid in the mouth, rectum and vagina of the body of the ten-year-old child. Death was by suffocation.

procedures. This is not the case in which to make that point. *See Michigan* v. *Tucker*, 42 U.S.L.W. 4887 (U.S. June 10, 1974).[4]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

The District Court opinion and judgment is reported at 375 F. Supp. 170 (1974).

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4. Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require tha policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

42 U.S.L.W. at 4891.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

September Term, 1974

Robert Anthony Williams, etc.,
Appellee,

vs.

Lou V. Brewer, etc.,
Appellant.

Appeal from the United States District Court for the Southern District of Iowa

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

Chief Judge Gibson with Judges Stephenson and Webster voted to grant the petition for rehearing en banc.

January 30, 1975

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

September Term, 1974

Robert Anthony Williams, a/k/a
Anthony Erthel Williams,
Appellee,

vs.

Lou V. Brewer, Warden of the Iowa State Penitentiary
at Fort Madison, Iowa,
Appellant.

Appeal from the United States District Court for the
Southern District of Iowa.

On Consideration of Appellant's motion for stay of mandate, it is now here ordered by this Court that appellant's motion for stay of mandate in this cause be granted pursuant to the following conditions:

The writ of release from custody should not issue for a period of sixty (60) days from the date of this order.

The writ shall be suspended if the State of Iowa pursues a new trial within the 60-day period.

Further, an application by the State of Iowa to the United States Supreme Court for a writ of certiorari shall stay the mandate of this Court. Should the Supreme Court deny review, the State of Iowa shall have 60 days from the date certiorari is denied in which to pursue a new trial.

Should the State of Iowa fail to pursue a new trial within 60 days from the date of this order or from denial or certiorari by the United States Supreme Court, appellee must be released from custody.

February 6, 1975

APPENDIX E

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. §2254(d):

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> "(1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> "(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> "(3) that the material facts were not adequately developed at the State court hearing;

> "(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> "(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> "(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> "(7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> "(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to

establish by convincing evidence that the factual determination by the State court was erroneous."

Title 18 U.S.C. §3501, Omnibus Crime Control and Safe Streets Act of 1968:

"§3501. Admissibility of confessions

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such

defendant was without the assistance of counsel when questioned and when giving such confession.

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offense against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at

which the person who made or gave such confession was not under arrest or other detention.

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

"Added Pub L. 90-351, Title II, §701(a), June 19, 1968, 82 Stat 210, and amended Pub L 90-578, Title III §301(a) (3), Oct. 17, 1968, 82 Stat 1115."